Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

PATRICIA CONROY

Petitioner,

v.

LOWER MERION TOWNSHIP
AND
LOWER MERION TOWNSHIP WORKERS ASSOCIATION

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Family and Medical Leave Act, 26 U.S.C.A. §2601, et seq, (FMLA) require the reinstatement of an employee on medical leave who requires the same accommodation she had prior to taking FMLA leave?

(2) Does the FMLA permit an employer to delay an employee's return to work following FMLA leave because of the employer's belief that the return to work certification is confusing and then require an employee to undergo a fitness for duty examination prior to being restored to her position based upon the employers past practice of requiring all employees on any leave to submit to an examination?

(3) Does the FMLA allow an employer to require a return to work certification or a fitness for duty examination when the employer's statutory FMLA notice fails to set forth those requirements for reinstatement?

(4) Does the ADA require employers to accommodate "regarded as" disabled employees?

PARTIES

The parties to this proceeding are set forth in the caption.

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There is a Conflict among the Circuits concerning the rights of employers to require employees to undergo fitness for duty examinations prior to being reinstated to their position following FMLA leave. Further, the job protections of the FMLA, and an employee's right to reinstatement is of such great importance in the United States, that this Court must set a national standard prohibiting employers from conditioning an employee's return to work on obtaining an IME when the employer is really seeking a clarification of a return to work certification. 13

The job protections of the FMLA are so fundamentally important to all workers that this Court must set a national standard and require all employers to adhere to the regulations requiring notice of the requirement to submit a return to work certification, prior to taking any action refusing to reinstate an employee to his position following FMLA leave. 19

Lastly, the Third Circuit, in ignoring the substantial evidence of Conroy's ADA claim and her "regarded as" ADA claim, and by affirming the District Court in granting summary judgment to the Township. The Third Circuit has ignored its own decisions and this Court has yet to rule on what accommodations are required to "regarded as" employees in the context

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Petitioner, Patricia Conroy, respectfully prays that this Honorable Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on August 8, 2003.

OPINIONS BELOW

The August 8, 2003 Opinion is set out at pp. 1a-7a of the Appendix "A" to this Petition. This opinion is unpublished. The District Court's Memorandum and Order of November 30, 2001 is set out at pp. 8a-19a of the Appendix "B" to this Petition. The District Court's Memorandum and Opinion of August 7, 2001, is set out at pp. 20a-25a of the Appendix "C" to this Petition.

JURISDICTION

The Order of December 15, 2003 denying Conroy's Petition for Rehearing En Banc is set out at pp. 26a-27a of the Appendix "D" to this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C.A. § 2614, in part, reads as follows:

(a) Restoration to position.
(b) (1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.
(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

29 U.S.C.A. 2615 reads, in part, as follows:

(a) Interference with rights.
(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

29 CFR § 825.301 reads, in part, as follows

(b)(1) The employer shall also provide the
employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

29 CFR § 825.310 reads, in part, as follows:

(b)If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer

> may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

42 U.S.C.A. § 12102, provides in part:

> (2) Disability. The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

STATEMENT OF THE CASE

This case was filed as an action for money damages and injunctive relief against the Township of Lower Merion and the Lower Merion Township Workers Union for violations of the Family and Medical Leave Act (FMLA) 29 U.S.C. §2601, et seq., the Americans With Disabilities Act (ADA), 42 U.S.C. §12111, et. seq., and breach of the duty of fair representation. The case was originally brought before the United States District Court for the Eastern District of Pennsylvania.

In this case, Patricia Conroy was employed as a clerk in the Finance Department of the Township of Lower Merion for almost twenty-three (23) years, all of which have been in the Township Municipal building located at 75 E. Lancaster

Avenue, Ardmore, PA, 19003. In 1985, Conroy injured her back in a non-work related incident. As a result of the injuries she sustained, Conroy has developed neuropathy and sensitivity to moving air currents.

In November of 1997, 13 years after the onset of her condition, the Township requested that Conroy submit to a medical evaluation, and as a result of the medical evaluation, the Township's physician found that Conroy did have a permanent back condition that was affected by air currents, and that Conroy should avoid cold air and drafts. The Township had, over the course of fifteen (15) years, accommodated this disability. However, Conroy requested to be moved, but the Township declined this request.

On March 8, 2000, Conroy went out of work due to the exacerbation of her neuropathy and back pain. The Township designated and granted this leave under the FMLA. On May 15, 2000, Conroy was cleared by her physician to return to work and provided the Township with the required physician's report from her doctor.[1] Nevertheless, the Township, in direct violation of the collective bargaining agreement ("CBA") and the FMLA, refused to permit her to return to work until Conroy submitted to an Independent Medical Evaluation ("IME") since the Township made its own determination that the certification was unclear and confusing.[2]

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[1] The Township never indicated in its required notice of her obligations under the FMLA, 29 CFR 825.301, that Conroy would have to submit a return to work certification or undergo a fitness for duty examination. This issue was the subject of Plaintiff's Motion for Summary Judgment, which the court denied by Order on April 28, 2002.

[2] The Township has always admitted that it never availed itself of the opportunity to seek clarification of the return to work certification.

Lower Merion Township continued to refuse Conroy's return to work and has forced Conroy to use her accrued sick and vacation time. When her sick and vacation time ran out on June 20, 2000, the Township stopped paying Conroy her regular salary. Conroy was subsequently terminated from her position of 23 years on September 9, 2000.

The Court initially granted the Township's Motion for Summary Judgment on the FMLA claims on August 7, 2001, and reversed itself on August 24, 2001.[3] As was apparent in this matter, the District Court felt that the Township had a past practice of requiring employees on any medical leave to undergo an independent medical examination as a condition precedent to returning to work. The Township also claimed that this past practice was an implied condition of the collective bargaining agreement since the collective bargaining agreement (CBA) never expressly allowed for a medical examination. At best, CBA required an employee to submit a certification to return to work, which Conroy complied with.

The District Court stated that it found that the Township properly had applied its "past practice" of requiring employee's returning from FMLA leave to submit to IME's as an implied condition of the CBA when it deemed the employee's medical certification unclear or confusing, and held that this was permissible under the FMLA. (Pet. App 23a). However, the District Court reversed this holding on August 24, 2001 when it held that there was insufficient evidence to prove that there was a past practice of requiring IME's following FMLA leave. The CBA was silent on this issue, yet the trial court held "an integration clause is not

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[3] The Trial Court initially held that the Township had a valid "past practice" of requiring all employees to undergo Independent Medical Examinations following all types of medical leave. (Pet. App. 25a).

necessarily dispositive where interpreting union contracts, the Court believes it is appropriate to consider Defendant's past practices in this case". (Pet. App. 23a).

The trial court went on to state that:

> Therefore, the question remains whether a practice that requires Plaintiff to submit to an IME where her medical certification is unclear, diminishes the protection of the FMLA.
> The Court finds that this practice does not interfere with the rights guaranteed by the FMLA. The FMLA simply entitles an employee to resume her employment. See 29 U.S.C. § 2614. It does not, however, ensure a particular administrative procedure for returning to work. Therefore, as Defendant is merely implementing a policy for handling situations where a certification is unclear, these practices do not restrict or even affect Plaintiff's rights under the FMLA. Even though requiring an IME creates an additional step for Plaintiff, Defendant covers the cost of the IME and this practice does not alter the standard for Plaintiff's eligibility or make it more difficult for Plaintiff to be deemed qualified to return. For these reasons, the Court finds that Defendant's use of past practices in this situation does not constitute a violation of the FMLA.[4]

The Third Circuit discussed this issue as well and affirmed the fact that after two months of leave, Conroy's

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[4] The trial court gave no weight or consideration to the regulations concerning clarification of return to work certifications. 29 C.F.R. 825.310 allows an employer to seek clarification of an employees certification, but the employer may not delay an employee's return to work pending the clarification.

doctor stated that Conroy could return to work but gave another vague statement that she should not be exposed to air currents. (Pet.App. 3a). The Third Circuit even acknowledged that Conroy had a prior IME in 1997 (Pet. App. 3a) and that:

> "[O]nce again, the Township requested that Conroy have an IME to determine precisely how it could accommodate her, but this time Conroy refused and instead requested that she be moved to another workplace.[5] Considering that Conroy had missed two months of work, the Township did not want to employ her without knowing exactly what working conditions would accommodate her condition. After her vacation and sick leave ran out, Conroy was terminated (under the terms of the Collective Bargaining Agreement ("CBA") with the union, any employee who has missed work for 180 days will be terminated).(Pet.App. 3a).

The Third Circuit stated that the return to work certification was "confusing" since it stated that Conroy could return to work "unrestricted" (Pet. App. 5a), and omitted the other language of this certification that indicated, as stated by the trial court, that she could return to work with the accommodation she had been receiving prior to the FMLA leave of "avoiding cold air and drafts". (Pet. App. 21a). The Third Circuit additionally stated that this was after the Township had made a good faith effort to accommodate her condition. (Pet. App. 5a).

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[5] Conroy did not ever request to have her work place moved while on leave, this request was made months before she ever went out on FMLA leave.

The Third Circuit also held that the District Court did not err by denying Conroy's motion to exclude evidence of the Township's prior practice with the union concerning IMEs following FMLA leave -- this evidence is **clearly relevant** (emphasis added) to the determination of whether the Township could require Conroy to undergo an IME, as past practice can be considered an implied term of the CBA and CBAs can supersede the FMLA. (Pet. App. 6a).

At trial, Conroy additionally requested that the FMLA retaliation claim go forward, but the Third Circuit held that the District Court did not err in stating that the issue of improper and/or lack of proper FMLA notice was raised too late and was prejudicial to the rights of the Defendant. (Pet. App. 6a). However, the District Court held that the notice was sufficient as a matter of law, not that it was raised too late. The lack of proper notice is an evidentiary issue, and not a new claim, and there was no dispute among the parties that the notice failed to make any mention of the requirement to submit a return to work certification or to submit to an IME.

At trial, Conroy set forth a prima facie case of a substantive violation of her rights under the FMLA, and for retaliation. The Township claimed that it did not have to reinstate her to prior position because she required an accommodation. Conroy stated that her doctor certification clearly indicated that she could return to work with the same accommodation she was receiving immediately prior to commencing her FMLA leave. The Trial Court granted Defendant Township's oral Rule 50 Motion, and dismissed the FMLA claims under the guise that Conroy was not entitled to reinstatement to a position where she required an accommodation, in spite of the fact that she was seeking reinstatement with the same accommodation she had prior to taking her FMLA leave.

Additionally, Conroy appealed the Trial Court's grant of summary judgment on her ADA claims. The Third Circuit acknowledged this aspect of her appeal, but made no mention or gave any consideration to the evidence she submitted in her brief in opposition to the grant of summary judgment. It was undisputed in the briefs that there was substantial evidence of her ADA qualifying disability, and her "regarded as" claims.[6] The Third Circuit made no mention of the "regarded as" claims, and affirmed the District Court by stating that it was the failure to undergo an IME under the FMLA that caused her to be fired, not her condition (ADA disability). The Third Circuit stated, "it was Conroy's failure to allow the Township to figure out how reasonably to accommodate her condition that led to her

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[6] The Township regarded her as disabled for at least the last 15 years; the Township designee indicated that Employee is disabled for purposes of the ADA. The Township even relieved Employee from switchboard duty. In 1997, the Township requested, and Employee agreed, to undergo an IME to determine, what, if any accommodations she will need. There were handwritten memos authored by a representative of the Township indicating that there is "measurable velocity"; "couldn't deny air coming in - based on smoke test and velometer; it disappt"; and "air blowing/rain 'worst of cond.'"; the Township forwarded a memorandum to Employee, dated 5/8/98, wherein the Township stated that as a further indication of their good faith staff in the Finance Department would endeavor to keep the windows closed, and that "[t]he Township believes that it has been responsive in trying to understand your medical condition and needs, and has, therefore, made every reasonable accommodation so that you may perform your normal activities in the workplace." In 1999, Conroy again requested that her work station be moved so that she could avoid drafts. . The Township refused to move her work even thought he evidence produced by the Township identified several suitable areas where Conroy could work and perform the essential functions of her job.

firing, not the Township's unwillingness to accommodate her."[7]

REASONS FOR GRANTING THE WRIT

There is a dispute among the Circuits in regards to the rights of employees, under the FMLA, to be reinstated to positions with the same accommodations they were receiving when they took FMLA leave. Moreover, the job protections of the FMLA are so fundamentally important to all workers in the United States that this Court must extend the protections of the FMLA and the substantive right to reinstatement to disabled employees who exercise their rights under the FMLA.

At issue in this case is a matter that is fundamental to the rights of all individuals that take leave under the Family and Medical Leave Act. 29 U.S.C.A 2601, et seq. In this case, Conroy had been receiving, as acknowledged by the Township, an accommodation for her back condition (neuropathy) for the previous 15 years. In 1997, the Township asked Plaintiff to participate in an independent medical evaluation, and it was determined that Conroy's back condition was aggravated by cold air and drafts.

As a result of this IME, Conroy was given the accommodation of working in an area that was free from cold air and drafts. It has always been undisputed that Conroy was able to perform the essential functions of her job.

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[7] It was undisputed in the record at trial and in the Third Circuit that Conroy was seeking to be reinstated with the same accommodation she was receiving when she took FMLA leave.

At trial, Conroy established a prima facie case of a violation of her substantive rights under the FMLA and for retaliation under the FMLA. At the close of Plaintiff's case in chief, the Township moved for dismissal under Rule 50 of the Federal Rules of Civil Procedure. Although it was undisputed at trial that Conroy was able to perform the essential functions of her position as a clerk in the finance office, she did require the same accommodation upon her return to work that she had been receiving prior to the commencement of her FMLA leave.

Based upon this need by Conroy to receive the same accommodation upon her return to work that she had been receiving immediately prior to her leave, the Township cited the case of *Rinehimer v. Cemcolift*, 292 F.3d 375 (3d Cir. 2002), for the stated proposition that the FMLA does not require an employer to reinstate an employee who requires an accommodation to perform the essential functions of their job. However, the Plaintiff in *Rinehimer* was reinstated to his position, but was eventually terminated after seeking to be returned to his former position.

In this case, Conroy was cleared by her physician to be reinstated to her previous position and that she still needed the same accommodation; i.e. avoidance of cold air and drafts. Despite this certification tendered by Conroy's treating physician, the Township refused to reinstate her until she underwent an IME to clear up the Township's confusion concerning the certification.[8]

The issue of the right of reinstatement of an employee who takes FMLA leave while they are being accommodated,

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[8] The Township admitted that it never sought clarification of the certification pursuant to 29 C.F.R. §825.310, and that it refused her return to work pending her completion of an IME.

is an issue of first impression in the Third Circuit. The issue was discussed in *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002), the Eighth Circuit discussed the interplay between the FMLA and the ADA for an employee on FMLA leave and stated:

> To determine whether an employee is capable of performing the essential functions of his job for purposes of FMLA entitlement, we do not utilize the same criteria outlined by the ADA and courts interpreting it. See *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858, 861 (8th Cir. 2000). Rather, because "the declared purposes of the FMLA and its legislative history" are concerned with maintaining job security, an FMLA inquiry examining employee's ability to perform the essential functions of his job focuses "on [his] ability to perform those functions in [his] current environment. 218 F.3d at 861-62. *Duty* at 495.

Under the rationale set forth by the Third Circuit in this case, if you have a disability that requires an accommodation, and you take FMLA leave, you no longer have a right to be reinstated to your position following the termination of your FMLA leave. This result excludes all disabled individuals who receive accommodations from ever being afforded the substantive job protections of the FMLA.

There is a dispute among the Circuits concerning the rights of employers to require employees to undergo fitness for duty examinations prior to being reinstated to their position following FMLA leave. Further, the job protections of the FMLA, and an employee's right to reinstatement is of such great importance in the United States, that this Court must set a national standard prohibiting employers from conditioning an employee's

return to work on obtaining an IME when the employer is really seeking a clarification of a return to work certification.

In this case, Conroy tendered a certificate to return to work, which arguably, she was not even required to tender since the Township failed to notify her of any requirement to submit a return to work certification. Notwithstanding this contention, the Township did require Conroy to submit to an Independent Medical Examination (IME) since the employer found her certification to be "unclear" and "confusing". By letter of May 11, 2000, addressed to Conroy's counsel, the Township stated, "Please inform Ms. Conroy that she may not return to work until she receives an independent medical examination from another physician who clears her to do so[9]." Conroy objected to an IME since she had previously undergone an IME for the Township, and since her certification was all that was needed under the FMLA to entitle her to reinstatement.

The District Court held that the requirement of an IME was not a violation of the FMLA when it stated:

> Therefore, the question remains whether a practice that requires Plaintiff to submit to an IME where her medical certification is unclear, diminishes the protection of the FMLA.
>
> The Court finds that this practice does not interfere with the rights guaranteed by the FMLA. The FMLA simply entitles an employee to resume her employment. See 29 U.S.C. § 2614. It does not,

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[9] Additionally, the Township admitted that the return to work certification was not reviewed by any physician, and that it is not the Township's policy to have medical certifications reviewed.

> however, ensure a particular administrative procedure for returning to work. Therefore, as Defendant is merely implementing a policy for handling situations where a certification is unclear, these practices do not restrict or even affect Plaintiff's rights under the FMLA. Even though requiring an IME creates an additional step for Plaintiff, Defendant covers the cost of the IME and this practice does not alter the standard for Plaintiff's eligibility or make it more difficult for Plaintiff to be deemed qualified to return. For these reasons, the Court finds that Defendant's use of past practices in this situation does not constitute a violation of the FMLA. (Pet. App. 24a).

Further, the Third Circuit held that the IME was a proper exercise of the Township's rights under the FMLA leave by stating "[a]fter two months of leave, Conroy's doctor stated that Conroy could return to work but gave another vague statement that she should not be exposed to air currents."

As stated by this Court in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002):

> The FMLA's central provision guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a disabling health problem; a family member's serious illness; or the arrival of a new son or daughter. 29 U.S.C. § 2612(a)(1). During the mandatory 12 weeks, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1).

The regulations do not permit a return to work physical unless the physical is "job related" or consistent with business necessity. 29 C.F.R. §825.310(b). Further, the ADA allows a physical for a warehouse worker who has a back problem, but not the lawyer who has an amputated leg.[10] In Conroy's case, she was a clerical employee who had already had an IME and who was already being accommodated, so it can hardly be said that there was a right to condition her reinstatement under the ADA requirement for having a physical. Neither the District Court nor the Third Circuit adopted this stance. Both courts held that the certification was confusing or vague, and that alone gave rise to the need for a fitness for duty examination.

The regulations also require that the certification itself "need only be a simple statement of n employee's ability to return to work". 29 C.F.R. §825.310(c). Further, this same regulation also states that an employer may seek clarification of this certification from the employee's health care provider", and that "an employer may not delay the employee's return to work while contact with the health care provider is being made". 29 C.F.R. §825.310. The Township never contacted Conroy's physician or discussed the certifications with any of its own physicians. In fact, the Township's policy is to never have a certification reviewed by a physician. Clearly, Conroy's substantive right to reinstatement was violated since the Township required her to undergo an IME and that she was fired from her position of 23 years for exercising her substantive right to be reinstated without undergoing an IME.

There are no Circuit Court opinions dealing with this issue, however, there are district court opinions from within

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[10] See 29 C.F.R. §825.310.

various circuits that conflict with the decisions by the Conroy trial court and the Third Circuit in regards to the requirement for an employee to undergo an IME as a condition precedent to being reinstated.

In the First Circuit, the District Court for the District of Massachusetts, in *Albert v. Runyon,* 6 F. Supp. 2d 57, 62 (D.Mass 1998), the trial court held that:

> An employer with questions about the scope or adequacy of a medical certification may take advantage of the FMLA provision allowing it to contact (which the Defendant Township did not do) the employee's clinician for clarification, but may not force an employee to submit to an examination before allowing her to return to work." *Albert* at 63, and,

> An employer may not order an employee returning from FMLA leave to submit to a fitness-for-duty-examination because of that leave, or because of an underlying condition that the employee's health care provider has certified will not interfere with the employee's ability to work, or because the employer views the certification as inadequate for its own purposes. *Albert* at 69.

In the Seventh Circuit, the District Court for the Southern District of Indiana, *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. In 1999) stated that the right of restoration is a substantive statutory right that is guaranteed to eligible employees by the FMLA. As such, it cannot easily be diminished or abrogated by a collective bargaining agreement. *Routes* at 995. When an employee submits a medical certification adequate for purposes of the FMLA (such as a Form 380), and the employer has no independent

reason to doubt the employee's fitness, "the employer cannot rely on the employee's FMLA leave (or [his or her] prior medical condition) to justify such an examination." *Routes* at 997.

In the Eighth Circuit, the District Court for the District of Minnesota, decided, in *Mathews v. Fairview Health Servs.*, 2003 U.S. Dist. LEXIS 5901 (D.Minn 2003), that the procedures and practices delineated in FMLA represent a prohibition on an employer making "its own determination of whether an employee is fit to return from FMLA leave." *Citing, Albert v. Runyon,* 6 F. Supp. 2d 57, 62 (D.Mass 1998).

In the Ninth Circuit, the District Court for the District of Oregon, in *Underhill v. Willamina Lumber Co.*, 1999 U.S. Dist. LEXIS 9722 (D.Or. 1999), held the "FMLA allows for additional clarification of an employee's fitness-to-return certification, an employer may not force an employee to submit to a further examination before allowing her to return to work. *Citing, Albert* at 63.

This case is not a case where there was a business necessity for Conroy's examination. Conroy's FMLA leave was not granted as a result of a work related injury. Conroy was a clerical employee and has had this injury since 1985. As agreed to at trial by the Township, Conroy was always able to perform the essential functions of her job. The Township had been accommodating her for her disability related to the 1985 injury. Prior to the need for the FMLA leave, Conroy was not requested to undergo an IME since the first IME conducted in 1997. Clearly, the fact that Conroy took FMLA leave is the only reason why the Township demanded her to undergo a new IME, in spite of the fact that Conroy was always able to perform the essential functions of her job.

The Third Circuit, in affirming the trial court regarding the requirement to undergo an IME, has now directly conflicted with the decisions of other District Courts in the various Circuits. As stated by this Court in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002),

> The FMLA's central provision guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a disabling health problem; a family member's serious illness; or the arrival of a new son or daughter. 29 U.S.C. § 2612(a)(1). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1)."

Clearly, there must be intervention by this Court on this very fundamental issue. The Third Circuit has now departed from the intent of the FMLA, and the law that has been established in several of the other Circuits.

The job protections of the FMLA are so fundamentally important to all workers that this Court must set a national standard and require all employers to adhere to the regulations requiring notice of the requirement to submit a return to work certification, prior to taking any action refusing to reinstate an employee to his position following FMLA leave.

The regulations promulgated pursuant to the FMLA provide clear and definitive guidance as to what notice is required to be given to an employee by the employer. 29 C.F.R. §825.301, provides in part, at paragraph (b)(1):

> The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:
>
> (v) any requirement for the employee to present a fitness for duty certificate to be restored to employment (see Sec. 825.310);

This particular regulation goes on to state, at paragraph (f), "If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice."

One of Conroy's best pieces of evidence of retaliation, in addition to her termination, is the fact that the employer's notice of her FMLA leave was the lack of any requirement to provide return to work certification, or submit to an IME. However, in a cruel twist of fate, the Third Circuit ruled that the issue of lack of notice was raised too late in the proceedings so as to constitute a prejudice to the Township. What the Third Circuit ignored was the fact that the trial court held that the notice was sufficient as a matter of law.[11]

The Third Circuit has never issued a decision on whether or not an employer can deny an employee's reinstatement when it fails to notify the employee of the duty to tender a return to work certification or the duty to undergo an IME.

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[11] The issue of improper notice was briefed in Summary Judgment motions months before trial.

However, the District Court in *Wilson v. Lemington Home For the Aged*, 159 F.Supp.2d 186 (W.D.Pa. 2001), stated that the plaintiff was discharged for failing, among other things, to tender a fitness for duty certification. The Court held, at page 192, "Once an employee gives notice to an employer that FMLA leave is requested, the employer is charged with the duty to "provide the employee with ***written*** notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." *Citing*, 29 C.F.R §825.301(b)(1)(emphasis added). The Court went on to state that the regulations are very clear on what must be provided in the written notice. *Wilson* at 192.

The *Wilson* Court continued by indicating that the employer in this case deemed the employee to have voluntarily quit for failing to comply with its FMLA policy of providing a medical certification. The Court stated that in order to take this said action, Defendant (employer) must have complied with 29 C.F.R. §825.301. *Wilson* at 193. The *Wilson* court deemed the failure of the employer to give the employee a notice setting for the requirement to notify the employee of the need to tender a return to work certification as retaliation. In Wilson, the court held that the Defendant's act of deeming Plaintiff to have quit on December 30, 1997, for the failure to provide a medical certification, constituted an interference with Plaintiff's exercise of her FMLA rights, in violation of 29 U.S.C. § 2615(a)(1).

Although there are no Circuit Court opinions on the issue of whether or not the lack of proper notice is sufficient evidence of interference or a retaliation claim under the FMLA, the Wilson court definitively sets a standard that should be adopted by this Court along with the other issues raised in this Writ of Certiorari.

Lastly, the Third Circuit, in ignoring the substantial evidence of Conroy's ADA claim and her "regarded as" ADA claim, and by affirming the District Court in granting summary judgment to the Township. The Third Circuit has ignored its own decisions and this Court has yet to rule on what accommodations are required to "regarded as" employees in the context of the ADA.

Under 42 USC §12111(8), "a qualified individual with a disability is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Clearly, it is undisputed that Conroy was qualified and was able to perform the essential functions of her job.

A disability is defined at 42 USC §12102(2) as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded having such an impairment.

In order for a major life activity to be substantially limited by an impairment, the impairment must leave the individual either (1) "unable to perform a major life activity that the average person in the population can perform" or (2) "significantly restricted as to the condition, manner, or duration under which the individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(i).

Conroy's disability is chronic back neuropathy (diseased nerves) that is aggravated by cold air and drafts. In the event the Court finds that Conroy does not have a disability within

the meaning of the Act, Conroy can clearly show that she is regarded as disabled as defined in *Buskirk v. Apollo Metals*, 307 F.3d 160, (3d Cir. 2002). *See also*, *Sarko v. Penn-Del Directory Co.*, 968 F. Supp 1026; *affirmed* 189 F.3d 464 (3d. Cir. 1999). In *Buskirk*, this Court stated, "[E]ven an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability." *Buskirk*, at 167, *citing*, *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d Cir.1998).

Based on the Township's past efforts to accommodate Conroy, it is clear that the Township cannot now claim that Conroy is not disabled for purposes of the PHRC or the ADA. Not only does Conroy have a disability under the ADA, she clearly has shown that the Township has regarded her as disabled under the Act for many years.

In *Buskirk v. Apollo Metals*, 307 F.3d 160, (3d Cir. 2002), the Third Circuit stated, "In general, an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." Citing, *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188 (3d Cir. 1999).

Buskirk did not address the issue of whether a "regarded as" employee was entitled to an accommodation, the court did cite *School Board of Nassau County v. Arline*, 480 U.S. 273, 288-89, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987), where the Supreme Court held that employers have an obligation to provide reasonable accommodations to employees who are regarded as disabled under the Rehabilitation Act.

Conroy only ever sought a reasonable accommodation, and the Township knew this. This is not a case where an employee was discharged for being unable to perform the essential functions of her job due to a disability, there was never any dispute about Conroy being able to perform the essential functions of her job. She merely wanted an accommodation, and this claim arose prior to her taking and exercising her rights under the FMLA.

The issue of a reasonable accommodation is not a novel issue in the "regarded as" line of cases. It is an issue that must be resolved under the ADA. Especially as it relates to individuals that are receiving accommodations for disabilities, and then who take FMLA leave, and then who are terminated pursuant to a statutory scheme and/or case law which does not require an employer to reinstate an employee if they require an accommodation.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted:

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APPENDIX

APPENDIX A

Decision of the United States Court of Appeals,
Third Circuit, Dated August 8, 2003

Patricia S. CONROY

v.

TOWNSHIP OF LOWER MERION;
LOWER MERION TOWNSHIP WORKERS
ASSOCIATION

No. 02-3217

Submitted: June 23, 2003
Decided: August 8, 2003

Affirmed.

Before SLOVITER, AMBRO, and BECKER, Circuit Judges.

BECKER, *Circuit Judge*.

Patricia S. **Conroy** appeals from the District Court's grant of judgment as a matter of law in favor of the defendant Township of Lower Merion on her claim brought pursuant to the Family Medical Leave Act ("FMLA"). She also appeals from the District Court's grant of summary judgment in favor of the Township on her claim under the Americans with Disability Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"), and in favor of the defendant Transport Workers Union ("TWU") on her

claim for breach of the duty of fair representation. We affirm. The facts and procedural history are involved but they are well known to the parties; we lay them out briefly below.

I.

Conroy was employed for many years as an accounting clerk in the Township's finance department. She injured her back in a non-work-related incident and, as a result, developed a sensitivity to air currents. Conroy presented the Township with a letter from her doctor stating that her back pain "is aggravated by certain weather conditions." [A504] Conroy's doctor also stated that she experiences "severe, intermittent pain" that is exacerbated by "several environmental and physical changes" including "exposure to air currents blowing from open windows," and recommended that Conroy work in an area where "she will not be exposed to drafts from open windows." [A508] The Township was unable to determine from the letter what precise steps it should take to deal with the problem, and hence it sent Conroy, at its own expense, for an independent medical examination ("IME") to determine how far away from vents, windows, *etc.* she could work (the Township had a longstanding practice of requesting that employees undergo IMEs to clarify confusing medical information).

The doctor conducting the IME determined that Conroy should avoid "actual, perceptible draft[s] that could be objectively documented by an industrial hygienist or HVAC specialist," and stated that "if the window 35 feet away from . . . Conroy's cubicle does not give rise to any air currents at her desk or cause an adverse change in temperature, then I am not supporting medically that the window be closed simply because she says to close it." [A518-519] The Township followed up on the doctor's suggestions and

employed a company to perform a ventilation survey of the finance department, including Conroy's work station. The results of the survey showed that there were no perceptible air currents directly impacting Conroy's work station; any air currents dissipated before they reached Conroy's cubicle. The Township informed Conroy that, despite the results of the survey, the finance department would endeavor to keep the windows closed. The Township also installed, at its own cost, an air vent above the entrance door to the finance department and weather stripping on all doors within the department.

However, Conroy's condition worsened and she took a leave of absence under the FMLA. Conroy's doctor indicated that Conroy's back pain became worse when the air conditioning was activated and when her supervisor opened both his window and the door to his office. In the doctor's opinion, "stressful working conditions and drafts in the work area are the cause of the exacerbation of pains in her back." [A538] After two months of leave, Conroy's doctor stated that Conroy could return to work but gave another vague statement that she should not be exposed to air currents. Once again, the Township requested that Conroy have an IME to determine precisely how it could accommodate her, but this time Conroy refused and instead requested that she be moved to another workplace. Considering that Conroy had missed two months of work, the Township did not want to employ her without knowing exactly what working conditions would accommodate her condition. After her vacation and sick leave ran out, Conroy was terminated (under the terms of the Collective Bargaining Agreement ("CBA") with the union, any employee who has missed work for 180 days will be terminated).

II.

Pursuant to 29 U.S.C. § 2614, employees taking FMLA leave are entitled to the following:

> (a) Restoration to position
> (1) In general
> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Although the Township was offering to restore Conroy to her position, Conroy claims that the Township violated 29 U.S.C. § 2615(a)(1), which prohibits employers from taking any action to "interfere with, restrain or deny the exercise of" rights under the FMLA, by requiring her to submit to an IME before returning to work. However, we note that *Rinehimer v. Cemcolift, Inc.* holds that "the FMLA does not require 'an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his medical leave.'" 292 F.3d 375, 384 (3d Cir. 2002) (internal citations omitted); *see also* 29 C.F.R. § 825.214(b) ("If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA."). Thus, the critical question is whether Conroy required an accommodation to perform the essential functions of her job (or an equivalent job). If so, then the Township had no duty to restore her to her position after she took FMLA leave, and the request that she undergo an IME certainly did not

interfere with her FMLA rights because she had no right to be restored at all.

We think that Conroy required accommodations. Conroy's doctor indicated that she had taken a leave of absence because her back problems had been exacerbated by stressful working conditions and that she should not return to work until conditions improved (although the doctor also made a somewhat confusing statement that she could "return to unrestricted duty" [A544]); this was after the Township had already made a good faith effort to accommodate Conroy. By requesting a second IME, the Township simply wanted to ensure that Conroy would not come back to work and be put in a situation in which her back problems would flare up again, causing her to miss more work. Without adequately addressing the air current problem (which required Conroy to submit to an IME), Conroy could not continue to perform the essential functions of her job because her back pain would likely worsen once again, causing her to miss work (she certainly could not perform the essential functions of her job if she was not able to work). It is difficult to understand why Conroy would not agree to an IME (the Township would have covered the cost), and it is most unfortunate that this fine, long-term employee of the Township so harmed herself by refusing to agree, but the refusal is fatal to her position. The Township could have outright refused to restore Conroy because she required an accommodation, and thus her claim that the Township violated her rights under the FMLA by requiring her to submit to an IME fails; the IME would have allowed the Township to restore Conroy to her position with an accommodation, something it was not required to do under the FMLA.

Neither can Conroy succeed on her FMLA retaliation claim. She simply has not adduced evidence from which an

inference can be drawn that she was fired because she exercised her FMLA rights and not because she refused to submit to an IME. Nor has she adduced evidence from which an inference can be drawn that the Township's request that she undergo an IME was a pretext for terminating her because she exercised her FMLA rights.

Conroy also fails on her claim that the District Court erred by excluding evidence of allegedly insufficient FMLA notice because she never pled (even though she amended her complaint twice) that the Township failed to provide sufficient notice under the FMLA. Thus, the District Court did not abuse its discretion by deciding that it would be prejudicial to the defendants to allow this claim to go forth when Conroy brought up the issue at such a late point. Nor did the District Court err by denying Conroy's motion to exclude evidence of the Township's prior practice with the union concerning IMEs -- this evidence is clearly relevant to the determination of whether the Township could require Conroy to undergo an IME, as past practice can be considered an implied term of the CBA and CBAs can supersede the FMLA. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311-12, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989); 29 U.S.C. §2614(a)(4).

The District Court also did not err by granting the Township's motion for summary judgment on the ADA and PHRA claims (which are properly evaluated as one statute) because Conroy cannot prove the elements of these claims. The ADA and PHRA require that Conroy be disabled in a way that affects major life activities, which she has not shown. *See* 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1). Additionally, Conroy must show that she suffered an adverse employment action as a result of discrimination and that the Township's nondiscriminatory

reason for her termination (that she refused to submit to an IME) was a pretext for discrimination. Rather, it appears that Conroy was terminated because she would not submit to an IME, not because of her condition. Moreover, although "an employer discriminates against a qualified individual with a disability when it does 'not make reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer],'" *Gaul v. Lucent Techs.*, 134 F.3d 576, 579 (3d Cir. 1998) (citing 42 U.S.C. § 12112(b)(5)(A)), it was Conroy's failure to allow the Township to figure out how reasonably to accommodate her condition that led to her firing, not the Township's unwillingness to accommodate her.

Finally, the District Court did not err by granting summary judgment to the TWU on Conroy's breach of the duty of fair representation claim. To succeed on a claim like this, Conroy was required to show that the union acted in bad faith by refusing to submit her claim to arbitration. *See Dykes v. SEPTA*, 68 F.3d 1564, 1571 (3d Cir. 1995), *cert. denied* 517 U.S. 1142 (1996). We conclude that Conroy has shown no evidence of bad faith, and that her underlying arguments that the Township discriminated and retaliated against her and failed to accommodate her appear to be without merit. Thus, the union acted reasonably.

The judgment of the District Court will be affirmed.

/s/ Edward R. Becker
Circuit Judge
August 8, 2003

APPENDIX B

Memorandum and Order of the United States District Court
for the Eastern District of Pennsylvania,
Dated November 30, 2001

Patricia S. CONROY

v.

TOWNSHIP OF LOWER MERION;
LOWER MERION TOWNSHIP WORKERS
ASSOCIATION

Civil Action: 00 CV 03528

November 30, 2001

MEMORANDUM AND ORDER

JUDGE RONALD BUCKWALTER

Plaintiff has filed a seven-count Amended Complaint.

Count I alleges that the Township of Lower Merion (Township) violated the Americans with Disabilities Act (ADA) by failing to accommodate her disability.

Count II charges the Township with retaliation under ADA because of plaintiff's filing a complaint with the Pennsylvania Human Relations Commission.

Counts III and IV charge the Township with violations of the Pennsylvania Human Relations Act for discrimination (Count III) and retaliation (Count IV).

Count V charges the Township under 42 U.S.C. § 1983 and § 1988, alleging denial of due process and violations of the First, Fourth, Fifth and Fourteenth **[*2]** Amendments to the United States Constitution.

Count VI alleges the Township violated the Family and Medical Leave Act (FMLA).

Count VII charges the Lower Merion Township Workers Association (Union) with breach of duty of fair representation.

Township filed a motion for summary judgment as to Counts I, II, III, IV and V, and has asked the court to reconsider its ruling on Count VI and grant summary judgment on it as well.

I. FACTS

Plaintiff has been employed as a clerk in the Finance Department of the Township for almost 23 years, all of which have been in the Township Municipal Building, 75 E. Lancaster Avenue, Ardmore, Pennsylvania. Sometime in 1984, she sustained an injury to her back in a non-work related incident. As a result, she developed neuropathy and sensitivity to moving air currents (*See* Amended Complaint). The Township has, according to plaintiff, over the course of 15 years, accommodated this sensitivity (*See* pages 1 and 2 of plaintiff's Amended Complaint). Later at page 4 of her Amended Complaint, plaintiff contradicts this by saying since November of 1997, the Township has failed to accommodate her condition.

The above contradiction may be based upon a series of events leading up to November of 1997. It appears that in September of 1996, plaintiff presented the Township with a

note from William W. Lander, M.D., dated September 12, 1996, stating that plaintiff "is under my care for chronic back pain which is aggravated by certain weather conditions." *See* September 12, 1996 note by Dr. Lander, Exhibit "E" of Township's brief. In response to this note by Lander, on February 21, 1997, Roseann Siso (Siso), the Township's Director of Personnel, sent a letter to Lander requesting medical evidence concerning plaintiff's diagnosis, prognosis and what, if any, restrictions and/or accommodations she needs due to her medical situation. *See* February 21, 1997 letter from Siso, Exhibit "F" of Township's brief. On or about July 7, 1997, Lander responded to Siso and indicated that plaintiff has had a "disabling neuropathy" since injuring her back in 1985 and, as a result, experiences "severe, intermittent pain" that is aggravated by "several environmental and physical changes" including "exposure to air currents blowing from open windows." *See* July 7, 1997 letter from Lander, Exhibit "G" of Township's brief. Because her condition could be aggravated by air currents, Lander recommended that Conroy work in an area where "she will not be exposed to drafts from open windows." Lander did not, however, indicate that plaintiff could not work in a space where a window would not expose her to a draft. Nor did Lander provide a diagnosis or prognosis, or state specific job duties that Conroy could not perform.

After receiving Lander's July 7, 1997 letter, the Township attempted to ascertain the scope and extent of plaintiff's condition, as well as the steps needed to "accommodate" this condition. Because Lander had not provided a diagnosis or specified the exact nature of the "environmental and physical changes" that aggravated plaintiff's back, the Township eventually decided to send plaintiff for an independent medical examination ("IME"). *See* July 25, 1997 memorandum from Siso to plaintiff, Exhibit "H" of Township's brief.

The Township contracted with Susan Blydenburgh, M.D., M.P.H. (Blydenburgh), the Medical Director at the Crozer Keystone Health System Centers for Occupational Health, to conduct the IME on plaintiff. *See* October 10, 1997 letter from Siso to Blydenburgh, Exhibit "I" of Township's brief. Siso explained to Blydenburgh that the Township wanted "medical evidence . . . stating Conroy's diagnosis, prognosis and what, if any, restrictions and/or accommodations she may need due to her medical situation." Of particular interest, Siso explained, was how indoor air movements affected plaintiff as opposed to normal air movement outdoors.

Blydenburgh eventually conducted an IME on plaintiff and reported the results back to the Township by letter dated October 30, 1997. *See* October 30, 1997 letter from Blydenburgh to Siso, Exhibit "J" of Township's brief. Based on her review of plaintiff's medical history, as well as a physical evaluation, Blydenburgh concluded that plaintiff's back pain was aggravated by cold temperatures and air movement and that plaintiff should "avoid cool temperatures and the issue of air movement -- which could come from a window or an air conditioning vent."

At the Township's request, Blydenburgh issued a follow-up letter clarifying several of the points she had made in her October 30 letter. *See* November 4, 1997 letter from Blydenburgh to Siso, Exhibit "K" of Township's brief. With respect to the issue of avoidance of drafts, Blydenburgh clarified that his means "an actual, perceptible draft that could be objectively documented by an industrial hygienist or HVAC specialist." Blydenburgh further stated that "if the window 35 feet away from . . . Conroy's cubicle does not give rise to any air currents at her desk or cause an adverse change in temperature, then I am not supporting medically that the window be closed simply because she says to close

it." Blydenburgh further indicated that it may be necessary to "objectively characterize indoor air conditions" in order to determine whether these aggravating conditions exist at Conroy's work station.

Following the Township's receipt of Blydenburgh's November 4 letter, plaintiff complained to the Finance Director, Mark Spector (Spector), that she has had to leave work on several occasions recently due to air currents emanating from Spector's and Bradley's offices. *See* January 23, 1998 memorandum from Conroy to Spector, Exhibit "L" of Township's brief. Nevertheless, in her own brief, plaintiff again states, "The Township has, over the course of 15 years, accommodated this disability. However, since 1999, the Township, despite knowing of plaintiff's disability, and without explanation, has refused to continue to accommodate her condition, all of which is in violation of the ADA and PHRC." (*See* Plaintiff's brief in answer to Lower Merion Township's Cross Motion for Summary Judgment, p. 2). It appears then that up until sometime in 1999, plaintiff herself acknowledges that Township has accommodated her disability.

It bears noting, however, that in response to plaintiff's memorandum dated January 23, 1998, Exhibit "L" of Township's brief, the Township followed Blydenburgh's suggestion and had ECS Risk Control, Inc. (ECS) perform a ventilation survey of the finance department, including plaintiff's work area.

ECS performed its ventilation survey on February 24, 1998, a cloudy and rainy day, with winds of approximately 35 miles an hour blowing into the side of the building where Spector's and Bradley's offices were located. *See* March 23, 1998 letter from Tim Horn to Siso, Exhibit "M" of Township's brief. ECS observed that under a variety of

scenarios, with Spector's and Bradley's windows and doors opened and closed, the service window opened and closed, the main door into the department opened and closed, and the ventilation system both off and on, no moving air currents occurred at plaintiff's work station. While air currents did move throughout the department under these scenarios, they dissipated before they reached plaintiff's cubicle. Under each scenario, ECS observed that smoke rose undisturbed to the ceiling and that no measurable airflow was detected by a velometer. Even though ECS did not observe any moving air currents at plaintiff's work station, it recommended that the Township install weather stripping at the bottom of the office doors and relief air vents between the hallway and office area.

The Township reported ECS's findings to plaintiff on April 28, 1998. *See* May 8, 1998 memorandum from Siso to plaintiff, Exhibit "N" of Township's brief. The Township further informed plaintiff that as a show of good faith, staff in the finance department would "endeavor to keep the windows closed" and, if the Director's or Assistant Director's windows were opened, every attempt would be made to keep their doors closed. The Township subsequently followed ECS's recommendations and installed an air vent above the entrance door to the department and rubber door sweeps on all doors within the department. *See* June 4, 1999 memorandum from Mike Beck (Beck), Supervisor of Facilities Maintenance, to Siso, Exhibit "O" of Township's brief.

Despite the efforts of the Township, plaintiff feels that since 1999, the Township has not accommodated her problem. In an April 27, 1999 memorandum, Exhibit "P" of Township's brief, she wrote, "Not feeling well. Rich's window open."

As she points out in her brief at p. 2, on March 8, 2000, plaintiff went out of work and by letter dated March 9, 2000, Exhibit "Q" of Township's brief, Dr. Lander stated:

> On this date, I have reexamined and treated my patient, **Patricia Conroy,** for recurrent low back pain. Her last visit to me was February 28, 2000 for a similar condition. However, her pain today is much more severe. Treatment today, as it was on her last visit, was injections of corticosteroids mixed with a local anesthetic. Today, three separate low back areas were injected.
>
> Mrs. Conroy related that the pain became much more intense following the activation of the building air conditioner with air streaming onto her body. This occurred on March 6, 2000. In spite of the pain, Mrs. Conroy returned to work on March 7, 2000. However, when Mrs. Conroy's immediate supervisor opened the office window and then left the room, leaving the door open, the pain became much more severe. She left work and has not worked on March 8th and 9th. I refer you to a letter I wrote to Lower Merion Township dated July 7, 1997.
>
> It has been my pleasure to have been Mrs. Conroy's physician for almost thirty-four years. During this time, I have treated her for migraine headaches and since her motor vehicle accident in 1985, I have been one of her physicians treating her low back pain. It is my professional opinion that stressful working conditions and drafts in the work area are the cause of the exacerbations of pain in her back, a disabling neuropathy. At this time, for medical reasons, I suggest Mrs. Conroy be placed on sick leave for an extended time until her condition and the conditions at work have improved.

The Township notified plaintiff by letter dated March 16, 2000, Exhibit "R" of Township's brief, that her "request for Family and Medical Leave Act (FMLA) is approved for your 'low-back pain.'" In pertinent part, the letter stated:

> In addition, you have asked for "written instructions" while you are out. As outlined in the enclosed FMLA Policy and Sick Leave Program and Policy and in accordance with Article 7.3b of the Collective Bargaining Agreement between the Worker's Association and Lower Merion Township, you will not be required to call in each work day as long as you continue on your approved and consecutive/extended sick leave of FMLA for "low-back pain."

Plaintiff was a member of the Union and her employment was governed by the Collective Bargaining Agreement (CBA).

On or about May 3, 2000, Dr. Lander drafted a letter to the Township indicating that plaintiff may return to work, but "should avoid drafts and stressful working conditions," since these exacerbate her "low back pain and migraine headaches." *See* May 3, 2000 letter from Lander to the Township, Exhibit "S" of Township's brief. Lander subsequently provided the Township with a completed "Medical Documentation for Non-Work Related Absence" form, which stated that plaintiff could "return to unrestricted duty" effective May 15, 2000. *See* May 18, 2000 Medical Documentation for Non-Work Related Absence, Exhibit "T" of Township's brief. Despite indicating that plaintiff could "return to unrestricted duty," Dr. Lander further stated that the Township should refer to a November 4, 1997 letter by Susan Blydenburgh, M.D., concerning plaintiff's need to avoid cold and drafts. In her November 4, 1997 letter, Dr.

Blydenburgh suggested that plaintiff avoid cool indoor air temperature and drafts. Thus, in his May 18 certification, Dr. Lander stated both that Conroy could return to "unrestricted duty" and that Conroy still needed to avoid cold and drafts.

Following the receipt of Lander's May 3 letter and what is considered internally inconsistent May 18 certification, the Township expressed confusion about the conditions under which Conroy could return to work. As a result, the Township requested Conroy to participate in an IME pursuant to the terms of the CBA. *See* May 26, 2000 letter from Jacqueline Z. Shulman to C. Scott Shields, Exhibit "U" of Township's brief. Plaintiff refused to consent to get an IME as requested by the Township. As the Township has argued in a prior motion, plaintiff is required by the past practices between the Township and the Union under the CBA to submit to an IME.

Plaintiff has not been allowed to return to work from her family and medical leave of absence. Plaintiff's employment with the Township ended on September 9, 2000 when her leave of absence surpassed 180 days. Under Article 7, Section 7.5 of the CBA, an employee may remain on leave from the Township for 180 days, after which time they lose their status as a Township employee under Article 13, Section 13.7. *See,* 1999-2002 Agreement between the Township and the Union, Articles 7 and 13, Exhibit "X" of Township's brief.

It is still not clear that the past practices of the Township required employees to undergo IME's when the employee's medical documentation was unclear, inconsistent or confusing. Both the uncontradicted Affidavit of Roseann Siso, Director of Human Resources for the Township, Exhibit "A" of Township's Supplemental Memorandum of Law (Docket No. 42), and the Declaration of Thomas G.

Strang, Secretary of the Union, attached to its brief (Docket No. 33), a portion of which is quoted from page 3 of his Declaration as follows:

> After receiving the attorneys' letter, I gave copies of it to the members of the Executive Board. We met to discuss Ms. Conroy's grievance and the attorneys' evaluation of it. The members of the Board recognized the Township's argument that there were some potential inconsistencies in the doctor's notes provided by Ms. Conroy. It troubled us that Ms. Conroy was resisting the offer to be examined by a doctor who would be chosen by her and the Township. This aspect of the Township's Family Medical Leave Policy which had been agreed to by the union, actually predated the Policy, and had never been a problem for other employees before. We thought that the Township's actions with regard to Ms. Conroy were not unreasonable and were consistent with our past practice;

are evidence that there was indeed such a policy. But the written Township FMLA policy seems to be somewhat inconsistent with this. In any event, the material facts necessary to establish the policy are not clear enough from the present record to summarily find in favor of the Township.

II. LAW

The plaintiff's § 1983 claim fails to the extent that plaintiff purports to argue a denial of due process, substantive as well as procedural. As to the former, there is no fundamental property interest in public employment for purposes of substantive due process. As to the latter, procedural due process is satisfied inasmuch as the CBA

provided plaintiff with the process she was due. Summary judgment will be granted as to Count V.

With regard to Counts I and III, alleging discrimination on the basis of her alleged disability, the initial hurdle for plaintiff is proving that her disability "chronic back pain" comes under the ADA definition of disability. There is really some doubt on this record that plaintiff has met the first hurdle.

However, assuming she can pass the prima facie hurdle under the *McDonnell-Douglas* burden shifting analysis applicable to ADA claims, *Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000), the Township has articulated a legitimate, non-discriminatory reason for not returning plaintiff to work; namely, that she would not submit to an IME. Because plaintiff refused to do so, the Township did not allow plaintiff to return to work. Her subsequent termination was mandated under the CBA when her leave of absence exceeded 180 days. See Article 7, Section 7.5.

Plaintiff has not been able to point to direct or circumstantial evidence from which a fact finder would reasonably disbelieve the Township's articulated legitimate reasons; or believe that an invidious discriminatory reason was more likely than not the determinative cause of its actions. Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994). Sheridan v. E.I.Dupont deNemours and Co., 100 F.3d 1061 (3d Cir. 1996). Indeed, by her own admission, the Township accommodated her back pain for 15 years until sometime in 1999. Thereafter, there is simply nothing plaintiff can point to that meets the Fuentes-Sheridan burden placed upon her.

As to Counts II and IV regarding retaliation, it is clear that plaintiff can point to no causal connection between her protected activity of filing a claim with the PHRA and the

Township's request that she have an IME before returning to work.

As to Count VII, the Union did not breach its duty of fair representation toward the plaintiff, based upon the uncontradicted facts of this case and the uncontradicted reason given by the Union with respect to plaintiff's case.

Accordingly, it is hereby **ORDERED** that:

(1) Judgment is entered in favor of defendant, Township of Lower Merion (Docket No. 34) and against plaintiff **Patricia** S. **Conroy,** on all counts except Count VI.

(2) Judgment is entered in favor of Lower Merion Township Workers Association (Docket No. 33) and against plaintiff **Patricia** S. **Conroy** on Count VII.

(3) Further proceedings in this case are STAYED until January 3, 2002. Thereafter, discovery may continue until February 4, 2002, limited to essentially the latest Affidavit of Roseann Siso, Exhibit "A" of Township's Supplemental Memorandum of Law.

(4) Except as set forth above, plaintiff's motion to exclude evidence produced after the close of discovery, etc. (Docket No. 44) is DENIED.

A status conference is scheduled for Wednesday, February 6, 2002 at 4:00 p.m. in the chambers of the undersigned.

BY THE COURT:
RONALD L. BUCKWALTER, J.

APPENDIX C

Memorandum and Order of the United States District Court
for the Eastern District of Pennsylvania,
Dated, August 7, 2001

Patricia S. CONROY
v.
TOWNSHIP OF LOWER MERION;
LOWER MERION TOWNSHIP WORKERS
ASSOCIATION

Civil Action: 00 CV 03528

Auust 7, 2001

ORDER

JUDGE RONALD BUCKWALTER

Currently before the Court is a motion for partial summary judgment on behalf of **Patricia Conroy** ("Plaintiff") and a cross-motion for summary judgment on behalf of Township of Lower Merion ("Defendant"). The Court will grant Defendant's cross-motion and will dismiss Count IV of Plaintiff's complaint.

I. BACKGROUND

This suit began when Plaintiff, an employee of Defendant, experienced aggravation of a chronic back problem and sought a leave of absence under the FMLA. Defendant granted Plaintiff leave. Approximately two months later, Plaintiff notified Defendant of her desire to

return to work. Plaintiff submitted a certification from her treating physician who wrote, "It is my professional opinion that Patricia may return to work. As noted previously, she should avoid drafts and stressful working conditions...." Pl. Ex. C-14. Finding this note unclear and confusing, Defendant informed Plaintiff that she would need to be evaluated by an independent medical examiner in order to ascertain her fitness to return to work. Plaintiff refused to comply and was not permitted to resume her employment. Ultimately, Plaintiff was terminated and she filed this suit.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). When considering a motion for summary judgment, a court must view all inferences in the light most favorable to the nonmoving party. See *United States v. Diebold*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). Therefore, it is plain that "Rule 56(c)" mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In such a situation, "the moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a

sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

As the parties agree that there are no material facts in dispute, the issue for summary judgment is whether Defendant violated the Family Medical Leave Act ("FMLA") when it conditioned Plaintiff's return to work on her obtaining an independent medical examination ("IME"). Plaintiff argues that the FMLA guaranteed her the right to return to work as long as her physician provided certification that she was fit to resume her employment. Defendant counters, arguing that Plaintiff's medical certification was unclear and confusing, and as the FMLA permits employers to develop procedures for restoring employees after absence, it did not act improperly when it invoked its own practices to handle this situation. Defendant also explains that the collective bargaining agreement ("CBA") between Defendant and Plaintiff's union supersedes the FMLA's procedures on the condition that the CBA procedures do not compromise the substantive rights guaranteed by FMLA.

The statutory provisions and the accompanying regulations that make up the FMLA are explicit in their discussion of the certification and return procedures for an employee who has taken leave. They permit an employer to require certification from an employee's physician stating that an employee is able to resume her work responsibilities. See Family and Medical Leave Act, 29 U.S.C. § 2614(a)(4) (2001); see also 29 C.F.R. § 825.310(a) (1993). Where clarification of this certification is necessary, employers are directed to consult the employee's physician rather than to

seek an additional examination. See 29 C.F.R. § 825.310(c).[1] Despite the existence of these provisions, the FMLA allows a CBA to establish its own procedures for an employee's return to work and these procedures can supersede those of the FMLA. See 29 U.S.C. § 2614(a)(4). The Supreme Court has held that when interpreting a CBA, a court may consider the parties' past practices as implied terms of the CBA. See *Conrail v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 311-12, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989). Accordingly, Defendant incorporated its own past practices into the CBA and developed procedures as permitted under the FMLA. Defendant consistently applied the same IME procedure utilized in this case in the twenty-six prior situations where an employee's medical certification was unclear or confusing. For these reasons, the Court will treat Defendant's past practices an implied condition of the CBA. Plaintiff argues that the existence of an integration clause in the CBA precludes treatment of Defendant's past practices as implied terms of the agreement. However, as an integration clause is not necessarily dispositive where interpreting union contracts, the Court believes it is appropriate to consider Defendant's past practices in this case. See County of Allegheny v. Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 381 A.2d 849, 855 (Pa. 1977).

Finally, the Court must determine whether these past

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[1] Plaintiff references a proposed regulation which the Department of Labor declined to adopt that would enable employers to obtain additional medical opinions in a fitness-for-duty certification. Plaintiff argues that this decision means the proposed procedure conflicted with the FMLA's statutory guarantees. The Court disagrees. The Department of Labor's reasons for declining to formalize the practice do not contemplate Plaintiff's argument and they do not even suggest disapproval of the practice. See Wage and Hour Division, 60 Fed. Reg. 2180, 2226 (Jan. 6, 1995).

practices compromise the protections afforded to Plaintiff under the FMLA, because where a provision of the CBA is more restrictive than that of the FMLA, the FMLA will supersede the CBA. See *McKiernan v. Smith-Edwards-Dunlap Co.*, 1995 Dist. LEXIS 6822, *12 (E.D. Pa. May 17, 1995) (citing 29 U.S.C. § 2652(b)). Therefore, the question remains whether a practice that requires Plaintiff to submit to an IME where her medical certification is unclear, diminishes the protection of the FMLA.

The Court finds that this practice does not interfere with the rights guaranteed by the FMLA. The FMLA simply entitles an employee to resume her employment. See 29 U.S.C. § 2614. It does not, however, ensure a particular administrative procedure for returning to work. Therefore, as Defendant is merely implementing a policy for handling situations where a certification is unclear, these practices do not restrict or even affect Plaintiff's rights under the FMLA. Even though requiring an IME creates an additional step for Plaintiff, Defendant covers the cost of the IME and this practice does not alter the standard for Plaintiff's eligibility or make it more difficult for Plaintiff to be deemed qualified to return. For these reasons, the Court finds that Defendant's use of past practices in this situation does not constitute a violation of the FMLA.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion for partial summary judgment and grants Defendant's cross-motion for partial summary judgment. Judgment is ordered for Defendant with respect to Count IV of Plaintiff's complaint.

An appropriate order follows.

ORDER

AND NOW, this 7th day of August, 2001, upon consideration of Plaintiff's Motion for Partial Summary Judgment (Docket No. 13), Defendant Township of Lower Merion's Response to Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment (Docket No. 14), Plaintiff's Answer to Lower Merion Township's Cross Motion [sic] for Summary Judgment (Docket No. 16), Defendant's Reply (Docket No. 20) and Plaintiff's Surreply Brief to Lower Merion Township's Cross Motion for Summary Judgment (Docket No. 24), it is hereby **ORDERED** that Plaintiff's motion for partial summary judgment is **DENIED** and Defendant's motion for partial summary judgment is **GRANTED**. Accordingly, Count IV of Plaintiff's complaint is dismissed with prejudice.

BY THE COURT:

RONALD L. BUCKWALTER, J.
August 7, 2001

APPENDIX D

Order of the United States Court of Appeals,
Third Circuit, Dated December 15, 2003

Patricia S. CONROY

v.

TOWNSHIP OF LOWER MERION;
LOWER MERION TOWNSHIP WORKERS
ASSOCIATION

No. 02-3217

Submitted: June 23, 2003
Decided: August 8, 2003
Rehearing Denied: December 15, 2003

SUR PETITION FOR PANEL REHEARING WITH
SUGGESTION FOR REHEARING *EN BANC*

Before SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF and BECKER, Circuit Judges.

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:

/s Edward R. Becker
Circuit Judge

Dated: December 15, 2003

(1)

Filed

No. 03-1302

IN THE

Supreme Court of the United States

PATRICIA S. CONROY,

Petitioner,

v.

TOWNSHIP OF LOWER MERION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWNSHIP OF LOWER MERION

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QUESTION PRESENTED

Petitioner Patricia Conroy missed over two months of continuous work under the Family and Medical Leave Act ("FMLA"), 26 U.S.C. § 2601, *et seq.*, because of back pain caused by moving air. The moving air emanated from an air-conditioning vent and open windows at her workplace. When Petitioner asked to return to work with workplace accommodations, the Township of Lower Merion (the "Respondent") requested a medical examination to determine what workplace accommodations were necessary to safely restore her. Respondent's request for a medical examination comported with past practice developed under the collective bargaining agreement ("CBA") between Respondent and Petitioner's union. Petitioner unreasonably refused.

The Petition raises the following question:

> Does the FMLA prohibit an employer from requiring, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, and consistent with past practice, an employee to undergo a medical examination, at the employer's cost, to determine what accommodations, if any, are necessary to return the employee safely to a workplace that, according to the employee's physician, caused her to miss over two months of work?

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29 C.F.R. § 825.214(b) 11

29 C.F.R. § 825.310(b) 12

29 C.F.R. § 825.702(a) 12

STATEMENT OF THE CASE

There is no conflict for the Court to resolve. The Third Circuit and Circuit Judge Edward Becker properly and unanimously affirmed the district court. This affirmance presents no conflict with any decision by either this Court or any court of appeals.

This matter also presents no far-reaching implications. The facts are unique and somewhat bizarre. This matter arises from Petitioner's puzzling refusal to accept Respondent's good faith efforts to return Petitioner safely to her workplace. Petitioner demands the "right" to be reinstated to the same workplace that caused her to miss over two months of work. As noted by Judge Becker, "[i]t is difficult to understand why Petitioner would not agree to an IME (the Respondent would have covered the cost), and it is most unfortunate that this fine, long-term, employee of the Respondent so harmed herself by refusing to agree, but her refusal is fatal to her position." (Pet. App. at 5a).

Petitioner took over two months of continuous medical leave under the FMLA. Petitioner's physician opined that workplace air currents caused Petitioner to have back pain; he restricted Petitioner from returning to work until her back pain and workplace "conditions" improved. While on leave, Petitioner requested additional accommodations — that Respondent move her workplace location and eliminate cold temperatures and drafts. In response, Respondent requested Petitioner to undergo a medical examination, at the Respondent's cost, to determine what accommodations to the workplace were necessary for Petitioner's safe return.

Petitioner sued Respondent under the ADA and FMLA. The district court granted summary judgment on all counts except the FMLA, and later granted judgment as a matter of law on the FMLA claims. The Third Circuit affirmed.

I. Clarification Of The Record.

Petitioner's facts bear little resemblance to the record and findings below.

A. Respondent affirmatively sought to make Petitioner more comfortable.

Respondent affirmatively sought to accommodate Petitioner's aversion to moving air. Years before Petitioner requested FMLA leave, Petitioner agreed to a medical examination, at Respondent's cost, to determine what accommodations were needed. Based on the physician's findings and recommendations, Respondent also retained a ventilation expert, again at Respondent's cost, to study moving air in Petitioner's workplace. The study showed that even with windows open and the air-conditioning system on, air currents dissipated before reaching Petitioner's workplace.

Nevertheless in 1988, in good faith, Respondent took additional affirmative steps, at its own cost, to make Petitioner more comfortable. Respondent informed Petitioner that her co-workers would endeavor to keep windows closed even in the absence of evidence that open windows caused moving air at Petitioner's workplace. Respondent also installed, again at its cost, an air vent above, and weather stripping under, the entrance door leading to her workplace.

B. Workplace moving air caused Petitioner to have back pain despite accommodations.

Despite the Respondent's efforts to make Petitioner more comfortable in her workplace, Petitioner left work because of back pain. Her physician concluded that moving air, flowing from both an air-conditioning vent and open windows, and "stressful working conditions," caused Petitioner to have back pain. Petitioner's physician then placed Petitioner on sick leave for over two months and proclaimed that she could not return to work until her condition and "her workplace conditions" improved. Respondent promptly approved[1] Petitioner's request for FMLA leave.

While on FMLA leave, Petitioner submitted to Respondent a medical certification that was objectively unclear and confusing. Her physician proclaimed Petitioner able to "return to unrestricted duty," but that she must avoid "cold and drafts." Because Respondent did not want to place Petitioner in the exact same workplace that caused her to miss over two months of work, it reasonably requested that she undergo a medical examination before restoration. Respondent sought to discover what accommodations were necessary to ensure Petitioner's safe return. Respondent followed this procedure with approximately 25 other employees on medical leave as part of its past practice under the CBA. The union agreed with Respondent that a medical examination was proper under the CBA.

---

1. Respondent specifically informed Petitioner that Respondent's FMLA Policy, which it provided to Petitioner, and the CBA between Petitioner's union and Respondent would govern her leave.

Because Petitioner steadfastly refused to cooperate with Respondent's requested medical examination, as was her obligation under the ADA, her seniority rights lapsed on September 9, 2000, under the CBA.

II. Petitioner's Claims.

Petitioner claimed, *inter alia*, that the Respondent violated the FMLA[2] and ADA. Petitioner alleged that Respondent failed to accommodate her in violation of the ADA. She also alleged that Respondent violated the FMLA by retaliating against her for taking leave and failing to restore her to her workplace following her FMLA leave.

The district court granted Respondent's motion for summary judgment on Petitioner's ADA claim because: (1) Petitioner was not disabled; (2) Respondent articulated a legitimate, non-discriminatory reason for not returning plaintiff to work — namely, that she would not submit to a medical examination; and (3) Petitioner could not show pretext.

The parties tried Petitioner's remaining FMLA claims to a jury, and the district court granted Respondent's motion for judgment as a matter of law at the close of Petitioner's case. The Third Circuit affirmed the district court. The Third Circuit affirmed because: (1) the FMLA does not grant a right of immediate restoration when additional accommodations are required, as with Petitioner; (2) Petitioner failed to present any evidence of FMLA retaliation; and (3) Petitioner failed

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2. Petitioner failed to aver in any pleading that Respondent violated the FMLA by failing to notify Petitioner that she may need to undergo a medical examination before restoration.

to plead that Respondent provided insufficient notice to Petitioner under the FMLA. The Third Circuit also affirmed the district court's grant of summary judgment on Petitioner's ADA claim because: (1) Petitioner was not disabled[3] under the law; (2) Respondent delayed Petitioner's restoration for legitimate non-discriminatory reasons (because she would not submit to a medical examination), and not because of a disability; and (3) Petitioner failed to allow Respondent to determine how to accommodate her condition.

REASONS FOR DENYING THE PETITION

I. Neither The Record Nor The Third Circuit's Ruling Below Raise The Questions Presented By The Petition.

The case below, as it relates to Petitioner's claims, involves only one basic question: whether the FMLA prohibits an employer from conditioning an employee's restoration on a medical examination, which comports with the employer's past practice under the CBA, and is proper under the ADA because the employee requested additional accommodations.

Petitioner's "questions presented" are not presented by the record or opinion below. Instead, they are an opaque attempt to garner the Court's undeserved attention. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").

---

3. Respondent also did not regard Petitioner as disabled under the ADA.

Petitioner's first "question presented" of whether the FMLA requires reinstatement of an employee on medical leave, who requires the same accommodation she had pre-leave, is absent from the record and opinion below. (Petition, page i). In stark contrast, Petitioner required additional accommodations to be able to return safely from her FMLA leave, *not* the same pre-leave workplace accommodations that caused her to miss over two months of work.

Petitioner's second "question presented" also is absent from the opinion below: whether the FMLA permits an employer to delay restoration until a medical examination because of the employer's past practice. (Petition, page i). The Third Circuit did not even mention Respondent's "past practice" with the union in affirming the district court.

Petitioner's third "question presented" of whether the FMLA allows an employer to condition restoration on a medical examination without first giving written notice to the employee, is also absent from the record and opinion below. (Petition, page i). Petitioner failed to plead in her Complaint (and two subsequent amendments), that the Respondent provided her deficient notice under the FMLA. Thus, Petitioner waived this claim.

Petitioner's fourth "question presented" of whether the ADA requires employers to accommodate "regarded as" disabled employees is also not presented by the record and opinion below. (Petition, page i). Neither the district court nor the Third Circuit discussed whether the ADA requires employers to accommodate "regarded as" disabled employees.

II. The Third Circuit's Ruling Does Not Conflict With A Decision By This Court Or Any Court Of Appeals.

There is no conflict between the circuits on the questions presented by Petitioner. Contrary to Petitioner's allegations, the Eighth Circuit's decision in *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002) does not conflict with the Third Circuit's decision below. The Third Circuit concluded that an employee returning from FMLA leave is not entitled to accommodations. In *Duty*, the Eighth Circuit did not even address this issue. Instead, the Eighth Circuit concluded that Duty presented enough evidence that she could perform the essential functions of her position.

The other cases cited by Petitioner also present no conflict among the circuits. Petitioner cites mostly district court cases, where the circuit court is silent on the questions presented. *See Albert v. Runyon*, 6 F. Supp. 2d 57 (D. Mass. 1998); *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. In. 1999); *Mathews v. Fairview Health Servs.*, 2003 U.S. Dist. LEXIS 5901 (D. Minn. 2003); *Underhill v. Willamina Lumber Co.*, 1999 U.S. Dist. LEXIS 9722 (D. Or. 1999). Further, these district court cases do not present a conflict with the Third Circuit's decision below because the *Albert*, *Routes*, *Mathews* and *Underhill* courts did not consider whether an employee is entitled to immediate restoration when additional accommodations are required for a safe return. These district courts also did not consider the implications of a past practice, as did the district court below.

In *Albert*, the court even noted that a fitness-for-duty examination under the ADA is contemplated by the FMLA:

> Holding that an employer needs some reason beyond an employee's having taken FMLA leave

> to justify ordering a fitness-for-duty examination does not imply that there is never adequate reason to require a returning employee to undergo such an examination. Indeed, the FMLA contemplates that this may happen. 29 C.F.R. § 825.310(b) ("Requirements under the [ADA] that any return-to-work physical be job-related and consistent with business necessity apply.")

Albert, 6 F. Supp at 69.

Petitioner also relies upon this Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Petitioner's reliance is misplaced. In *Ragsdale* this Court considered the validity of a regulation promulgated by the Secretary of Labor, not the questions presented here — medical examinations under the ADA consistent with past practice.

The only other cases relied upon by Petitioner are *Buskirk v. Apollo Metals*, 307 F.3d 160 (3d Cir. 2002), and *Wilson v. Lemington Home for the Aged*, 159 F. Supp.2d 186 (W.D. Pa. 2001). These cases do not present a conflict with the Third Circuit's decision below. *Buskirk* clarified the elements of a "regarded as" claim under the ADA, which is not an issue discussed by the Third Circuit's decision below. *Wilson* is unhelpful to Petitioner because the court did not consider whether an employee's request for additional accommodations can delay restoration under the FMLA. Any difference between the Third Circuit's decision below and one of its previous decisions, or a decision by a district court in the Third Circuit is best left to the Third Circuit to resolve.

Because Petitioner fails to present a conflict among the circuits on the question presented, the petition for writ of certiorari should be denied.

III. This Case Does Not Have Any Far Reaching Implications.

This case turns on its own unique facts, and has no far reaching implications. The question presented arises only in the situation where an employee, while on FMLA leave, requires additional accommodations under the ADA, but refuses to undergo a medical examination, which is consistent with past practice, to ensure her safe return. This set of circumstances is so rare that no other case has dealt with it. Any ruling by this Court should be limited to the bizarre set of facts below.

Petitioner's own words reflect the oddity of her claim:

> A. I was not required to get an IME to return to work.
>
> Q. Okay. Let me get this straight, so it's clear. What you're saying is the Township should have said Mrs. Conroy, come back into work, and in the first minute of you coming to work having restored you to your job, said to you, okay, now as your first duty being back in your job, you have to go see a doctor —
>
> A. I would be required —

Q. — is that what you are saying?

A. — under the contract to do so.

Q. Okay. And that's what you wanted to happen?

A. I didn't think it would be necessary, but I went by what was rightfully the correct way to do it.

Q. And that is what your lawsuit is all about.

A. Yes, you had to bring me back and you chose not to.

Q. And if the Respondent had brought you back and as you showed up —

A. I would have performed another — I wasn't due to retire until 2003, I'd still be there.

Q. Would you have undergone an IME?

A. If I was required to I would have.

(NT, 7/24/02 at 94-5).

Because the facts of this case are not generally applicable, the Court should deny the petition for writ of certiorari.

IV. The Third Circuit Was Correct In Affirming The District Court.

The Third Circuit properly affirmed[4] the district court. Judgment as a matter of law on Petitioner's FMLA claims was proper. Petitioner was not entitled to immediate restoration under the FMLA; she required additional accommodations to ensure a safe return. The only way for the Respondent to determine what accommodations, if any, were necessary was to require Petitioner to undergo a medical examination. Respondent's decision to condition Petitioner's restoration on her attendance at a medical examination does not state a claim under the FMLA.

The Secretary of Labor has promulgated regulations that support the Third Circuit's decision below. The regulations clarify that an employee has no right to restoration when she requires an accommodation. 29 C.F.R. § 825.214(b) ("If the employee is unable to perform an essential function of the position because of physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA"). As noted by the Third Circuit, "without adequately addressing the air current problem (which required Petitioner to submit to an IME), Petitioner could not continue to perform the essential functions of her job." (Pet. App. at 5a).

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4. Third Circuit properly affirmed the District Court's grant of summary judgment to Respondent. The undisputed evidence established that Petitioner was not disabled, and Petitioner failed to adduce any evidence that Respondent's legitimate non-discriminatory reason for not reinstating her (the need for a medical examination) was pretext.

Similarly, the Secretary of Labor, in harmony with the Third Circuit's decision, has recognized that return-to-work physicals under the ADA may be required of an employee returning from FMLA leave. C.F.R. § 825.310(b) ("[R]equirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job related and consistent with business necessity apply.") In fact, the Legislature did not intend the FMLA to modify the ADA. 29 C.F.R. § 825.702(a) ("FMLA's legislative history explains that FMLA is 'not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990.")

If Petitioner were to have her way, the FMLA would prohibit medical examinations under the ADA for employees returning from FMLA leave. Such a reading of the FMLA is unreasonable.

Because the Third Circuit was correct in affirming the district court, this Court should deny the petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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